Comment

The Need for a Different Standard and Analysis in Equal Employment Opportunity Cases Arising in the Prison Setting

I. INTRODUCTION

Congress passed Title VII of the Civil Rights Act of 1964[1] to halt discrimination on the basis of race, color, religion, sex, or national origin. Realizing, however, that some employment situations exist in which these attributes could be a necessary job requirement, Congress also included section 703(e) in Title VII.[2] This section is the bona fide occupational qualification (hereinafter BFOQ) and permits gender-based job qualifications[3] if a person's sex is reasonably necessary to the normal operation of a particular business.[4]

The BFOQ has been viewed as a very narrow exception to the general rule forbidding discrimination.[5] Although it has arisen in various settings, this Comment will concentrate on the area of guard positions in penal institutions. Traditionally, when guard positions involve high inmate contact, they have been restricted to members of the same sex as that of the inmate population. With the passage of Title VII, female as well as male correction officers began filing suit claiming that the prison administrator's refusal to place them in high contact positions with inmates of the opposite sex constituted sex discrimination.

The federal courts have abused their discretion in cases dealing with state prison systems. These courts have utilized a strict scrutiny standard, which places upon prison administrators the burden of proving that they are unable to accommodate equal employment opportunity concerns in the prison setting before a BFOQ defense will be considered.[6] This standard of review is contrary to the rational relationship test traditionally employed by the federal courts when dealing with claims arising in the state prison setting. The rational relationship standard requires the court to limit its review to the issue whether the Constitution has been violated and to presume that the actions of the prison administrator are reasonable in the absence of clear testimony that they are not.[7] Although this standard traditionally has been employed in cases of inmates against the prison administrator, it should be equally applicable in cases brought by guards against the prison administrator. The rationale of the Supreme Court, the states' interests in penological objectives, and society's attitudes toward privacy rights support the proposition that in sex discrimination cases brought

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1976)).

2. 42 U.S.C. § 2000e-2(e) (1976).

3. It also permits qualifications based on religion or national origin; however, this Comment is restricted to the gender-based classification.

4. 42 U.S.C. § 2000e-2(e) (1976).

5. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1983).

6. *See infra* notes 30-62 and accompanying text.

7. *See infra* notes 113-27 and accompanying text.

by state prison guards, the federal courts should defer to the states' executive and legislative branches of the government.

Additionally, even if the federal courts were to refuse to apply a deference standard in equal employment opportunity cases arising in the prison setting, the courts' present approach fails to balance properly the competing interests. When a guard files suit claiming sex discrimination in job assignments, the prison administrator usually raises the BFOQ defense based upon security concerns and inmates' privacy rights. The federal courts have restricted the BFOQ defense to security concerns and inmates' rights only in so far as security is affected.[8] Without considering what constitutional rights an inmate might have, the federal courts have ruled that any rights retained by inmates must give way to the rights of the guards.[9] When an inmate files suit against the prison claiming that guards of the opposite sex have violated his or her right to privacy, the federal courts find equal employment opportunity to be the interest advanced by the prison administrator[10] when the actual interest of the prison administrator is prison security. By resorting to the deference standard, the court can find the administrator's actions reasonable. These approaches confuse the actual issues that are before the court.

In a suit brought by guards alleging sex discrimination, the competing interests are a person's statutory right to equal job opportunities and an inmate's constitutional right to privacy. Because the claim arises in a prison setting, the court must balance the interests keeping in mind the primary purposes of a prison—security, rehabilitation, and deterrence.[11] In a suit brought by inmates, the competing interests are an inmate's constitutional right to privacy and the prison administrator's need to take reasonable measures to insure security. In neither case should the prison administrator have to advance a guard's statutory right to equal job opportunities, although this is the federal courts' approach. In both situations the courts consider the state interest of providing equal job opportunities to be of overriding concern. However, equal job opportunities are not the administrator's primary concern; rather, they are tangential to the prison's primary purposes.

The present approach taken by the federal courts assures that a guard's statutory right to equal employment opportunities will be considered fully whether a suit is brought by prison guards or inmates, but does not provide the same consideration to an inmate's rights. This approach leaves the prison administrator with inadequate guidelines regarding the parameters of an inmate's rights. Furthermore, it creates additional litigation by inmates who later file suit claiming a violation of their constitutional right to privacy when guards of the opposite sex are posted in areas where inmates can be viewed in the nude, partially undressed, or performing bodily functions. In addition, this approach derogates inmates' rights. By failing to consider properly the inmates' rights in the first instance, the federal courts refuse to recognize a BFOQ and mandate that guards be hired regardless of sex. When an inmate subse-

8. *See, e.g.*, Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981).

9. *See infra* notes 65–72 and accompanying text.

10. *See infra* notes 90–111 and accompanying text.

11. Pell v. Procunier, 417 U.S. 817, 822–23 (1974).

quently files suit, his or her constitutional rights already have been seriously circumscribed, although the inmate was never a party to the first action.

The purpose of this Comment is to outline a procedure that would limit the role played by the federal courts in equal employment opportunity cases arising in a state prison setting and allow for a proper balancing of the competing interests. The Comment begins with an analysis of the standards of review employed by the federal courts in cases in which guards claim a denial of their equal employment opportunity rights and cases in which inmates claim that the use of guards of the opposite sex in certain areas of the prison violates their constitutional right to privacy. Next, the Comment discusses the standard of review that should be followed and the need for prison administrators to represent the inmates' rights when the inmates are not party to the suit. Finally, the Comment analyzes the problems that have arisen from the failure of the federal courts to apply a deference standard and to consider an inmate's constitutional right of privacy and how utilization of the proferred approach can resolve these difficulties.

II. Standard of Review Utilized by Federal Courts

A. *Analysis of Sex Discrimination Claims by Guards in the Prison Setting*

The BFOQ exception reads in pertinent part as follows:

> Notwithstanding any other provision of this subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[12]

When the BFOQ defense is raised, a prima facie case of sex discrimination is established since the employer is admitting sex to be a criterion in job selection.[13] By 1977 two basic tests had evolved to determine the analysis to be applied in order to recognize a BFOQ and, therefore, that the employer was not in violation of Title VII.

The first test was set out by the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*[14] In *Weeks* a woman filed suit claiming she was denied the position of telephone/telegraph switch operator on the basis of her sex. Noting that it was "dealing with a humanitarian remedial statute which serves an important public purpose,"[15] the court placed the burden of proving the applicability of the BFOQ exception upon the person (the employer) claiming it. Based upon legislative intent, the court found the exception to be a very narrow one.[16] The employer had the burden of proving that he had a reasonable cause, that is, a factual basis for believing that all or substantially all women would be unable to perform the duties of the job safely and efficiently.[17] The restriction used by the employer was based upon weight lifting

12. 42 U.S.C. § 2000e-2(e) (1976).

13. Dothard v. Rawlinson, 433 U.S. 321, 332 (1977).

14. 408 F.2d 228 (5th Cir. 1969).

15. *Id.* at 232.

16. *Id.* at 232 n.3 (the court cited an interpretative memorandum by Senators Clark and Chase. 110 Cong. Rec. 7213 (1964) and H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963)).

17. 408 F.2d 228, 235 (5th Cir. 1969).

requirements and the employer's belief that the job was too strenuous for a woman. The court found this to be a stereotypical characterization and, therefore, that the employer had failed to meet his burden. The court held that whether a job was too dangerous or too difficult for a woman was for the woman, not the employer, to decide.[18] Accordingly, the test in *Weeks* is to deny the BFOQ exception when it is based upon stereotyped characterizations rather than upon a factual basis.

The second test was also set out by the Fifth Circuit in *Diaz v. Pan American World Airways*.[19] In *Diaz* a man brought suit claiming he was denied a flight cabin attendant position on the basis of his sex. The court developed the business necessity test, which established that discrimination based on sex was valid only when the essence (primary purpose) of the business would be undermined by not hiring members of one sex exclusively.[20] The court first determined that the primary purpose of an airline was to safely transport passengers from one point to another. The airline's argument of customer preference for female attendants therefore failed because this was tangential rather than essential to the defendant's primary purpose.[21]

Accordingly, when the Supreme Court's first and only case dealing with the BFOQ exception was granted certiorari, the test, in essence, placed the burden upon the employer to show that (1) a factual basis existed for believing that substantially all members of one sex could not perform the job properly rather than a preconceived notion of stereotyped characterization and (2) the duties were necessary to the business and not merely collateral. The Supreme Court case of *Dothard v. Rawlinson*[22] was a class action on behalf of women claiming discrimination because they were denied guard positions in Alabama's male maximum security prisons. The District Court for the Middle District of Alabama had rejected defendants' BFOQ defense relying on the view of the federal courts that this provided only the narrowest of exceptions to the general rule requiring equality of employment opportunities.[23] Based on the fact that women were allowed to work in the minimum and medium security male penal institutions, the court held that defendants' BFOQ defense was a pretext. The court further found that any inmate privacy rights could be resolved by rearranging work assignments.[24] The Supreme Court agreed that the BFOQ was a narrow exception.[25] Referring to *Weeks* and *Diaz*, the Court noted that whatever the verbal formulation might be, the federal courts were in agreement that it was impermissible under Title VII to refuse to hire a person on the basis of stereotyped characterizations of the sexes.[26] In deciding *Dothard*, however, the Court explained that the general proposition that it was for a woman to decide whether to accept the risks of a position did not apply in this case. If, by reason of a guard's sex, the security of the institution would be undermined, then the prison's security must be given preference.

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18. *Id.* at 236.
19. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).
20. *Id.* at 388.
21. *Id.*
22. 433 U.S. 321 (1977).
23. Mieth v. Dothard, 418 F. Supp. 1169, 1179, *aff'd in part and rev'd in part sub nom.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).
24. *Id.* at 1185.
25. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).
26. *Id.* at 333.

> In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a "contact" position in a maximum security male prison.[27]

The Court concluded that the primary purpose of a correctional counselor's job was to maintain security. In this case evidence of extreme violence, understaffing, lack of segregation of prisoners by offense, and constitutionally intolerable prison conditions was presented to the Court.[28] The Court held that in these circumstances a woman's ability to maintain security might be directly reduced by reason of her sex. The Court, therefore, upheld the BFOQ and did not require the prison administrator to take remedial measures in order to employ females.[29] Unlike the district court, the Supreme Court did not treat the defendants' differentiation between maximum and medium/minimum security prisons as a pretext. The Court did not deal with the issue of an inmate's right to privacy because it decided in favor of the BFOQ.

One of the difficulties that has arisen from *Dothard* is uncertainty regarding the standard employed by the Court. *Dothard* can be read as deferring to the prison administrator's decision that, based upon the circumstances of this case, a BFOQ was a reasonable way to resolve the problem of prison security. Alternatively, *Dothard* can be read as the Court's independent conclusion that a BFOQ was proper and can be restricted to its facts. The federal courts have followed and developed the latter formulation.

Accordingly, federal courts have confined *Dothard* to its facts, have refused to recognize a BFOQ absent identical *Dothard* conditions, and have made their own, independent conclusion regarding prison conditions and the remedies to be undertaken by the prison administrators. For example, in *Manley v. Mobile County*,[30] one of the first cases to deal with the BFOQ exception after *Dothard*, a female plaintiff brought suit claiming sex discrimination because of defendant's refusal to hire her as an identification assistant officer at the county jail.[31] The sheriff testified that (1) extraordinary conditions of overcrowding existed (a statewide court order had restricted the number of prisoners that could be sent to the state penitentiary); (2) over half of the inmates were felons who had committed crimes of violence; (3) escapes and disruptions occurred frequently; (4) hostages had been taken; and (5) officers had been stabbed and assaulted.[32] The District Court for the Southern District of Alabama held that the facts of this case were not comparable to those in *Dothard* and that the BFOQ defense was not applicable.[33] In the court's opinion, whenever a security threat did arise, a male guard could be posted to remain in the identification room while the female guard performed her duties.[34]

This same analysis was applied in *Gunther v. Iowa State Men's Reformatory*.[35]

27. *Id.* at 335 (footnote omitted).
28. *Id.* at 335–36.
29. *Id.* at 336.
30. 441 F. Supp. 1351 (S.D. Ala. 1977).
31. *Id.* at 1353.
32. *Id.* at 1354.
33. *Id.* at 1358.
34. *Id.* at 1359.
35. 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

In *Gunther*, a female plaintiff claimed discrimination on the basis of sex for failure to promote her above the position of correction officer II at the Men's Reformatory at Anamosa.[36] The suit originally had been brought in state court.[37] On appeal, the Iowa Supreme Court held that under Iowa law a BFOQ existed for the correction officer II classification.[38] Plaintiff then filed in federal court on the basis of Title VII.[39] The prison administrator claimed that placing women in the correction officer II classification (an inmate contact position) would (1) violate the inmates' privacy rights; (2) jeopardize prison security and rehabilitative programs; (3) put the guards, both male and female, in increased danger; (4) lead to major disciplinary problems; and (5) create serious administrative problems in trying to make assignments that would avoid these problems without treating male officers unfairly.[40] The District Court for the Northern District of Iowa, in a decision that was affirmed by the Eighth Circuit, disagreed with the administrator's resolution of the problem and disallowed the BFOQ.[41] The court found that the conditions at Anamosa were not comparable to the conditions set out in *Dothard*[42] and that the issue of inmates' privacy rights was not properly before the court.[43]

In *Harden v. Dayton Human Rehabilitation Center*[44] plaintiff, a female rehabilitation specialist, claimed discrimination on the basis of sex because the center had refused to transfer her to the male quarters of the center after notifying her that the female quarters were being eliminated.[45] The superintendent of the center argued that due to budgetary constraints, each staff specialist had to be able to perform all job functions and therefore he was unable to accommodate inmate privacy rights.[46] He further argued that he had based his need for a BFOQ not only upon budgetary constraints but also upon his personal observation that the physical layout of the center would enable female employees to view male inmates who were disrobing.[47] The District Court for the Southern District of Ohio disagreed and found that job assignments could be rearranged.[48] It also said that any opinion of the administrator regarding violations of inmates' privacy rights could be disregarded because it was based upon speculation rather than fact.[49] Accordingly, the court disallowed the BFOQ.[50]

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36. *Id.* at 954.

37. The lower court case was not reported.

38. Iowa Dep't. of Social Serv. v. Iowa Merit Employment Dep't., 261 N.W.2d 161 (Iowa 1977).

39. 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

40. *Id.* at 955.

41. *Id.* at 957.

42. Conditions at Anamosa were not found to be constitutionally intolerable. The inmate population was only composed of 3.3% sex offenders, *id.* at 954, n.1, as compared to the 10% finding in Dothard. In addition, Anamosa was a medium rather than maximum security prison. *Id.* at 955.

43. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1070, 1087 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

44. 520 F. Supp. 769 (S.D. Ohio 1981).

45. *Id.* at 771.

46. *Id.* at 772.

47. *Id.* at 775.

48. *Id.*

49. *Id.*

50. *Id.* at 782.

In *Hardin v. Stynchcomb*[51] a female plaintiff brought suit claiming sex discrimination for defendant's refusal to hire her as a deputy sheriff.[52] For training and morale purposes, defendant had a policy of requiring deputy sheriffs to work their first six months in the jail before assigning jobs connected with the public. Consequently, the sheriff would hire female deputies only when contact positions were available in the female section of the jail, allegedly in order to protect inmates' rights to privacy.[53] The sheriff also claimed that the jail met the conditions of a maximum security institution with violent and overcrowded conditions and that employing women in the male section would threaten jail security.[54] The court disagreed. It did not believe that security would be undermined if women worked in the male section of the jail. The court found that women would help to normalize the prison environment and that defendant could modify his rotation system to avoid any clashes with inmates' privacy rights.[55] Accordingly, the BFOQ was disallowed.[56]

Finally, in *Griffin v. Michigan Department of Corrections*,[57] female plaintiffs brought suit claiming defendant's policy of refusing to allow women to work in its three male maximum security prisons constituted sex discrimination.[58] The prison administrator's position was that having women in these institutions posed a security risk due to the character of the inmate population. He further argued that because of the security measures taken at the maximum security prisons,[59] allowing women employees in the male prisons would be a violation of the inmate's right to privacy.[60] The court disagreed. It found the prisons did not meet *Dothard* conditions, an inmate's right to privacy was of no concern, and women could have a normalizing effect on the prison environment.[61] Accordingly, the BFOQ was disallowed.[62]

Each of these cases reflects a substitution by the federal court of its own opinion for that of the prison administrator's. The cases show a very narrow reading of *Dothard* and a refusal to consider the applicability of a BFOQ in circumstances that are not identical to those in *Dothard* in spite of the fact that cases since *Dothard* have raised the issue of an inmate's right to privacy—an issue with which the Court in *Dothard* did not deal. Accordingly, federal courts, while performing their own,

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51. 691 F.2d 1364 (11th Cir. 1982).

52. *Id.* at 1365.

53. *Id.* at 1367.

54. *Id.* at 1367, n.9. It is understood that regardless of the standard of review employed by the courts, a final determination is inevitably based upon the credence the court gives to the evidence presented. *Hardin* may have failed even if the court had followed a deference standard. For some interesting reading, see *id.* at 1370, n.20 where the court quotes part of the testimony of L. B. Eason, the Chief Jailer at the Fulton County Sheriff's Department. In addition to explaining the psychological differences between men and women based upon Adam and Eve in the garden of paradise he explains that "God created a lady for men to love and cherish and I cannot imagine any woman wanting to put herself in the position of a man." *Id.*

55. *Id.* at 1373.

56. *Id.* at 1374.

57. 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982).

58. *Id.* at 29,212.

59. Strip searches were part of the regular routine, *id.* at 29,216, and unannounced security checks were frequently made. *Id.* at 29,211.

60. *Id.* at 29,217.

61. *Id.* at 29,222.

62. *Id.*

independent evaluation of prison conditions, also must reach a determination of the extent of an inmate's right to privacy.

In this context, the federal courts have either avoided the issue of inmates' privacy rights by refusing to deal with it,[63] have restricted their analysis to how prison security might be affected,[64] or, as was done by the court in *Griffin*, have decided that no right exists. The federal court's refusal to deal with the privacy issue is reflected in several cases. In *Hardin v. Stynchcomb*[65] the Eleventh Circuit required the defendant to modify its rotation system but never advised the defendant of what privacy rights the inmates might have. Rather than specifically dealing with the privacy issue, the court limited its comments to examples of what it might consider a privacy invasion. "[T]he inmates' retained privacy rights may be unnecessarily invaded by having deputies of the opposite sex conduct strip or body cavity searches, or oversee use of toilet and shower facilities."[66] In *Harden v. Dayton Human Rehabilitation Center*[67] the District Court for the Southern District of Ohio commented that even if privacy issues had been directly raised, the court would have declined to rule upon them because they were based upon speculation rather than actual claims.[68]

An alternative approach adopted by the federal courts to avoid the issue of inmate privacy rights is to hold that prison administrators do not have standing to raise the claim of an inmate's right to privacy. Under this approach, the court deals with the privacy issue only to the extent that it affects the administrator's concern for prison security. In *Harden* the court explained:

> To the extent that evaluation of the validity of defendant's bfoq defense has necessitated the general consideration of privacy rights, the Court has done so, but has carefully refrained from indicating either the precise extent of the privacy interests herein, or in what manner those interests might be invaded by the hiring of female guards.[69]

In *Gunther v. Iowa State Men's Reformatory*[70] the District Court for the Northern District of Iowa, in a decision that was affirmed by the Eighth Circuit, commented, "It is not clear that these rights [inmates' privacy] may be raised by defendants except as they relate to order and other legitimate purposes of the institution."[71] The district court noted that if the issue were actually before it, further proceedings would be required. The court found it unnecessary to reach the privacy

63. *See, e.g.*, Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981).

64. *See, e.g.*, Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981); Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

65. 691 F.2d 1364 (11th Cir. 1982).

66. *Id.* at 1373.

67. 520 F. Supp. 769 (S.D. Ohio 1981).

68. *Id.* at 782.

69. *Id.* at 781.

70. 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

71. 462 F. Supp. 952, 956, n.4 (N.D. Iowa 1979).

question because the female plaintiff was seeking a guard position with limited functions.[72]

A final judicial approach adopted to avoid the issue of inmates' privacy rights was employed by the District Court for the Eastern District of Michigan in *Griffin v. Michigan Department of Corrections*.[73] Relying upon a footnote in *Gunther* and a decision by the California Superior Court of San Luis Obisbo County, the court decided that "[i]nmates do not possess any protected right under the Constitution against being viewed while naked by correction officers of the opposite sex."[74] The court further stated that defendant's claim on behalf of the inmates was merely a ploy to justify sexual discrimination in hiring and promotion policies in state correction facilities. "Defendants have deliberately formulated their work assignment and promotional policies to produce a direct conflict between the inmates' right to minimal privacy and Plaintiffs' equal employment opportunities as mandated by Title VII."[75]

An understanding of the standard used by the federal courts to judge sex discrimination suits and the extent to which the courts will consider an inmate's right to privacy reveals a necessary result of the courts' approach. Because the federal courts are dealing with the issue of equal employment opportunity, the courts believe they should apply their own, independent evaluation of how the competing interests of inmate privacy and equal employment opportunity best can be reconciled.[76] By refusing to consider the scope of an inmate's right to privacy and holding that the courts' perceived penological concern of equal employment opportunities is paramount to inmate privacy rights, the courts can require prison administrators to take remedial measures that depreciate the inmate's interests in privacy and can avoid deciding whether such measures are appropriate until an inmate files suit. This failure to consider fully an inmate's right to privacy also permits the courts to strike down the BFOQ defense by restricting its BFOQ analysis to the stereotyped characterization test of *Weeks*[77] and the primary purpose test of *Diaz*.[78]

The federal courts consistently have applied this analysis. In *Gunther v. Iowa State Men's Reformatory*[79] the District Court for the Northern District of Iowa held that plaintiff was entitled to a correction officer position that did not involve conducting strip searches or viewing the inmates while showering or using toilet facilities.[80] This could be accomplished by rearranging job assignments. A BFOQ was held not proper because (1) defendant's fear of a female's impact on prison discipline was highly speculative and based upon stereotypical views (the *Weeks* test); and (2) the

72. *Id.* In the state action, plaintiff had requested assignment to the position of CO II. The court refused to modify the classification so that plaintiff would be allowed to perform some but not all of the CO II duties. Iowa Dep't of Social Serv. v. Iowa Merit Employment Dep't, 261 N.W.2d 161, 162 (Iowa 1977). When plaintiff filed in federal court she sought CO II status with a functional assignment of duties so as to protect any rights of inmate privacy which might exist. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

73. 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982).

74. *Id.* at 29,221.

75. *Id.* at 29,222.

76. *See supra* notes 30–62 and accompanying text.

77. *See supra* notes 14–18 and accompanying text.

78. *See supra* notes 19–21 and accompanying text.

79. 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

80. *Id.* at 955.

primary purpose of the prison (surveillance) would not be undermined if job assignments were rearranged (the *Diaz* test).[81]

In *Harden v. Dayton Human Rehabilitation Center*[82] the District Court for the Southern District of Ohio held that plaintiff was entitled to retain her position as a rehabilitation specialist I at the center, although the female quarters had been abolished.[83] The court felt that the administrator could take appropriate measures to minimize privacy violations such as restricting job assignments, installing shower doors, or providing the inmates with appropriate sleepwear. A BFOQ was held not proper because (1) defendant admitted women could handle the job if it were not for budgetary constraints[84] (the *Weeks* test), and (2) defendant's belief that privacy rights would be violated was based upon speculation and therefore did not provide a proper basis for claiming the primary purpose of the prison would be undermined[85] (the *Diaz* test).

The same approach was taken in *Hardin v. Stynchcomb*.[86] In *Hardin* the Eleventh Circuit found that defendant could modify its rotation policy despite defendant's claim to the contrary.[87] A BFOQ was held not proper because (1) adjusting job assignments would defeat the claim women could not handle the job based on inmate privacy claims[88] (the *Weeks* test), and (2) defendant's policy of requiring deputies to work in the county jail for six months was not the essence of the sheriff's business[89] (the *Diaz* test).

B. *Analysis of Inmates' Claims of Violations of Privacy Rights by Guards of the Opposite Sex*

Inmates' claims of privacy violations by guards of the opposite sex have arisen after the prison administrators have attempted to implement the court's orders by employing guards of both sexes. *Forts v. Ward* was the first case to deal directly with this conflict.[90] In *Forts* female inmates claimed a violation of their rights to privacy and sought a preliminary injunction to enjoin assignment of male guards to duties in housing and hospital units. Defendants had assigned guards to positions regardless of sex.[91] Both the District Court for the Southern District of New York and the Second Circuit made their own, independent determinations how the inmates' privacy rights could be reconciled with equal employment opportunity interests. Each court found that the proper approach was to determine whether an accommodation could be

81. *Id.* 956, n.4, and 957.
82. 520 F. Supp. 769 (S.D. Ohio 1981).
83. *Id.* at 782. Defendants claimed that plaintiff should not be reinstated because she was totally disabled due to injuries received prior to the court's decision. The court remanded the case to the magistrate for the sole purpose of determining what remedies could properly be afforded to the plaintiff. *Id.*
84. *Id.* at 772.
85. *Id.* at 775.
86. 691 F.2d 1364 (11th Cir. 1982).
87. *Id.* at 1373.
88. *Id.*
89. *Id.* at 1372.
90. 471 F. Supp. 1095 (S.D.N.Y. 1979), *vacated and remanded*, 621 F.2d 1210 (2d Cir. 1980).
91. 621 F.2d 1210, 1212 (2d Cir. 1980).

made before deciding whether one interest had to be vindicated to the detriment of the other.[92] Because each court believed it had reached a proper accommodation, the question of whether a BFOQ would be proper never needed to be considered. Because each court was basing its opinion on its own perception of the facts rather than upon the views of the prison administrator, the courts disagreed over the best way to reconcile the interests.[93]

The lower court held that male guards could not be assigned to locations where inmates could be viewed completely or partially unclothed, to night shifts, or to the first morning count. The court recommended defendant to install smoky or mottled glass at the showers to protect inmates from being viewed by guards of the opposite sex. In the court's opinion:

> While some out–of–the–ordinary steps are justifiable to reconcile the conflicting rights here, to require of an inmate extensive artificial procedure to preserve minimal human dignity in order to enable a man to be her guard at such time is, in itself, a dimunition of that dignity and is, in my opinion, too high a price to pay for the equality of job opportunity . . . .[94]

The appellate court disagreed. Without considering whether the lower court's opinion justified a BFOQ and, therefore, was not in violation of Title VII, the appellate court held that refusing to allow male guards to work night shifts was a denial of equal employment opportunities for both the male and female guards.[95] The court found that providing appropriate sleepwear to inmates could resolve the conflict. Thus, inmates would be properly clothed when viewed by a guard of the opposite sex, and no privacy problem would exist. Guards then could fill positions regardless of sex and satisfy equal employment opportunity requirements. The court of appeals felt that the lower court had failed to explore the range of sleepwear available.[96]

Although *Forts* recognized that inmates were entitled to some measure of privacy, the federal courts' emphasis on equal employment opportunities has been accompanied by a continuing derogation of inmates' privacy rights. Prison administrators' reluctance to impose a BFOQ on guard positions has caused further deterioration of these rights. As long as federal courts fail to consider the inmate's constitutional right to privacy and limit their review to prison security, the scales will be unfairly balanced in favor of equal employment opportunity. This biased balancing approach seriously hampers the ability of the inmate to present a constitutional claim in a subsequent suit.

This derogation of rights is reflected in *Smith v. Fairman*.[97] In *Smith* an inmate challenged the prison rules which allowed female guards to conduct "frisk"

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92. 471 F. Supp. 1095, 1098 (S.D.N.Y. 1979); 621 F.2d 1210, 1212 (2d Cir. 1980).

93. 621 F.2d 1210, 1216–17 (2d Cir. 1980).

94. 471 F. Supp. 1095, 1101 (S.D.N.Y. 1979).

95. 621 F.2d 1210, 1216 (2d Cir. 1980).

96. *Id.* at 1217. Arguing over sleepwear is just the type of minutiae that concerned the Supreme Court in Bell v. Wolfish, 441 U.S. 520 (1979). *See infra* note 122 and accompanying text.

97. 678 F.2d 52 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1879 (1983).

searches[98] of male inmates. The Seventh Circuit's analysis began with the proposition that absent *Dothard* conditions, a state could not legally refuse to hire a guard on the basis of sex, regardless of the position.[99] The court failed to consider that the Court in *Dothard* did not deal with the issue of an inmate's right to privacy and, therefore, left open the question whether this would constitute the kind of particular circumstances necessary to justify a BFOQ. The *Smith* court found that the only privacy to which the inmate was entitled was not having his genitals, the "final bastion of privacy," touched by members of the opposite sex.[100] This conclusion was based upon the premise that even if an inmate retains rights, these rights necessarily must be diminished by the central need of prison authorities to maintain institutional security. This was combined with the belief that the state was required to hire women as guards and, therefore, must be allowed to utilize them to the fullest extent possible. The court therefore decided that plaintiff's privacy rights were limited to his genitals and that, by forbidding female guards from touching them, the guards would not be infringing upon any constitutional right the inmate might have.[101]

A year later, in *Madyun v. Franzen*[102] the Seventh Circuit emphasized the importance it placed on equal employment opportunities over claims by inmates of violations of their constitutional rights. Relying on *Smith*, the court dismissed plaintiff's claim that a pat down search by female guards violated his right to privacy.[103] Plaintiff also claimed that the search violated his first amendment right to the free exercise of religion.[104] In the court's opinion, prison rules which incidentally restrained the free exercise of religion would be justified only if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective.[105] Rather than finding the important objective to be prison security, the court found it to be equal employment opportunity.[106] Accordingly, the regulation was justified. Finally, plaintiff claimed a denial of equal protection in that the prison's regulations allowed male inmates to be frisked by male or female guards, but female inmates could be frisked only by female guards.[107] The court responded, "[S]ince the distinction that allows women guards to search male inmates advances this important state interest [equalizing job opportunities], we hold that it passes muster under the equal protection clause."[108]

Cumbey v. Meachum is a final example of the derogation of inmates' right to privacy to protect equal employment opportunities of prison guards of the opposite

98. Frisk searches involve a pat down of the inmate's outer clothing for the purpose of determining whether the inmate is carrying weapons or contraband. *Id.* at 53.

99. *Id.* at 54.

100. *Id.* at 55.

101. *Id.*

102. 704 F.2d 954 (7th Cir.), *cert. denied*, 104 S. Ct. 493 (1983).

103. *Id.* at 957.

104. It was not contested that plaintiff was a Muslim, that his beliefs were sincere, and that the tenets of his religion forbade physical contact with a woman other than his wife or mother. *Id.*

105. *Id.* at 960 (quoting LaReau v. MacDougal, 473 F.2d 974, 979 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)).

106. *Id.* at 960.

107. *Id.* at 961.

108. *Id.* at 963.

sex.[109] In *Cumbey* the lower court dismissed a male inmate's complaint of a privacy violation by a female guard as frivolous, finding that the plaintiff could not make any rational argument on the law or facts to support his claim.[110] The Tenth Circuit reversed and remanded concluding that "[a]lthough the inmate's right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether."[111] Although the court of appeals remanded, the district court's decision reflects more closely the trend in the federal courts to abrogate seriously inmates' rights when the rights are balanced against equal employment opportunities.

The problem in *Smith*, *Madyun*, and *Cumbey* is the failure on the part of each court to analyze an inmate's constitutional right of privacy. No discussion appears in these cases on the basis of the right. Each of these cases begins with the premise that any rights an inmate possesses necessarily are diminished by his or her incarceration.[112] The issue, then, becomes one of how much the right can be diminished, rather than whether consideration of equal employment opportunity in the prison setting now needs to be modified because it is conflicting with legitimate security and rehabilitative goals.

III. A Suggested Approach For The Federal Courts

A. *Standard of Review—Deference to the Prison Administrator as Representative of the State Legislative and Executive Branches of the Government*

When claims of constitutional violations have been brought by inmates against prison administrators, the Supreme Court has utilized the rational relationship test. The Court consistently has held that the courts should defer to the prison administrator who implements the policies of the legislative and executive branches of the government in the area of prison administration.[113] This deference reflects no more than a "healthy sense of realism"[114] that the prison administrator, and not the federal court, is the expert in this area.

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109. 684 F.2d 712 (10th Cir. 1982).

110. *Id.* at 714.

111. *Id.*

112. Smith v. Fairman, 678 F.2d 52, 54 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1879 (1983); Madyun v. Franzen, 704 F.2d 954, 956 (7th Cir. 1983); Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982).

113. *See* Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Bell v. Wolfish, 441 U.S. 520, 548–49 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 127–29 (1977); Pell v. Procunier, 471 U.S. 817, 827 (1974); Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

114. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 138 (1977). The District Court for the Eastern District of North Carolina had granted to inmates the right to solicit union membership. The court said no consensus existed among experts whether such activity constituted a security threat and the prison administrator had therefore failed to meet the burden of proving that it would in fact constitute such a threat. Disagreeing, the Supreme Court responded: "The district court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." *Id.* at 125.

The Court has reiterated this position as recently as 1981 in *Rhodes v. Chapman*.[123]

The Supreme Court consistently has held that the prison environment is unique and that traditional rules that apply to free society must be modified to meet this environment.[124] Even when an inmate claims a violation of his or her constitutional rights, the court must defer to the prison administrator's judgment unless the heavy burden of proving unreasonableness is met.[125] The administrator is not required to show alternative ways of approaching the problem or that a danger to the security of the institution has in fact occurred.[126] If, using this standard, the court finds the actions to be constitutionally prohibited, the prison administrator should fashion a remedy to cure the problem.[127]

Although this standard of review consistently has been applied in cases between inmates and prison authorities, the federal courts have refused to apply it in equal employment opportunity cases.[128] This refusal constitutes an abuse of discretion by the federal courts. Although *Dothard* did not clearly state which standard was being applied, the Court did not invalidate the prison administrator's position that women could be employed in the male minimum and medium security prisons but not in the maximum security prisons. Nor did the Court in *Dothard* consider whether remedial measures should be undertaken to allow female guards in the male maximum security prisons.[129] This standard of review should not be altered merely because the competing interest in equal employment opportunity cases in the prison setting is that of private citizens rather than inmates.

In *Bell v. Wolfish*[130] the argument was made that deference to prison administrators was required only in cases brought by inmates against the prison and did not apply in cases brought by pretrial detainees (citizens who had been charged with a crime and held without bail but who had not yet been tried on the charge).[131] The Court disagreed, explaining that although previous decisions had involved inmates, the reasons for deferring to the informed discretion of the prison administrator were the complexity of running a penal institution, the inability of the courts to deal with the problem, and the fact that the management of the institutions reposed in the legislative and executive branches of the government. "While those cases each concerned restrictions governing convicted inmates, the principles of deference enunciated in them is not dependent on that happenstance."[132] In *Jones v. North Carolina Prisoners' Labor Union*[133] the Court added, "Moreover, where state penal

123. 452 U.S. 337, 352 (1981).

124. *See* Hudson v. Thomas, 52 U.S.L.W. 5052, 5054 (July 3, 1984), Hewitt v. Helms, 459 U.S. 460 (1983); Rhodes v. Chapman, 452 U.S. 337, 352–53 (1981); Bell v. Wolfish, 441 U.S. 520, 548–49 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 127 (1977); Wolff v. McDonnell, 418 U.S. 539, 567 (1974); Pell v. Procunier, 471 U.S. 817, 827 (1974); Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

125. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977).

126. *Id.* at 132.

127. *Id.* at 137.

128. *See supra* notes 30–62 and accompanying text.

129. Dothard v. Rawlinson, 433 U.S. 321, 336–37 (1977).

130. 441 U.S. 520 (1979).

131. *Id.* at 548, n.29.

132. *Id.*

133. 433 U.S. 119 (1977).

> The solutions to problems arising within correctional facilities will never be simple or easy. Prisons, by definitions, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped by experience or otherwise to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances.[115]

The standard of review for the court begins with the presumption that the actions of the prison administrator are reasonable.[116] Absent a showing that the belief that led to the action was unreasonable, the court may not substitute its own opinion and may not place upon the prison administrator the affirmative burden of justifying the action taken.[117] This standard is based upon the notion that it is the administrator who is most intimately familiar with the physical structure of the prison, the size and capabilities of the prison guard force, and the character of the inmate population. This expertise develops with actual day–to–day experience and training, not from esoteric reflections of what conditions and circumstances ought to be.

Despite the Supreme Court's admonition that deference should be given to the prison administrator's judgment, the federal courts have continued to become overly involved.[118] One of the most flagrant examples was the district court's actions in *Bell v. Wolfish*.[119] In *Bell* the District Court for the Southern District of New York, in a decision that was in large part affirmed by the Second Circuit Court of Appeals, intervened broadly into almost every facet of the penal institution enjoining no fewer than twenty of the institution's practices.[120] The district court did so based upon its belief that the prison administrator had failed to sustain the affirmative burden of showing the practices were instituted due to an actual security threat or that less restrictive measures were not available.[121] The Supreme Court flatly rejected this reasoning and admonished:

> [C]ourts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan . . . . [T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution . . . .[122]

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115. *Id.* at 137 (Burger, J., concurring).

116. *Id.* at 128.

117. *Id.*

118. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983); Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Meachum v. Fano, 427 U.S. 215 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 471 U.S. 817 (1974).

119. 441 U.S. 520 (1979).

120. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977).

121. 428 F. Supp. 333, 340 (S.D.N.Y.) (granting partial summary judgment).

122. 441 U.S. 520, 562 (1979).

institutions are involved federal courts have a further reason for deference to the appropriate prison authorities."[134]

By supplanting their own solution for that of the prison administrator on how the competing interests best can be reconciled rather than restricting their analysis to whether the administrator's actions are unreasonable, the federal courts are usurping the states' responsibility to regulate state prisons. The courts improperly are substituting their own opinions of the effect of guards of the opposite sex on the inmate population rather than deferring to the states' opinion. As the Supreme Court in *Bell v. Wolfish*[135] held "[T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution . . . ."[136]

The diverse opinions of experts, state administrators, and federal courts on the impact of hiring guards of a sex opposite that of the inmates in the prison setting support the notion that deference to the prison administrator should be employed. Justice Marshall in his dissenting opinion in *Dothard* argued that the use of female guards in male prisons would help to normalize the environment in the prison and further the goal of rehabilitation.

> Presumably, one of the goals of the Alabama prison system is the eradication of inmates' antisocial behavior pattern so that prisoners will be able to live one day in a free society. Sex offenders can begin this process by learning to relate to women guards in a socially acceptable manner.[137]

Without discussing the psychological question of whether placing female guards in superior positions over sex offenders assists the rehabilitative process, some federal courts have utilized the general argument that guards of the opposite sex do help to normalize the environment. In *Griffin v. Michigan Department of Corrections*[138] the District Court for the Eastern District of Michigan opined, "Eradicating the discriminatory treatment toward women will not only be fair, equitable and bring Defendants' policies and practices into harmony with the state of the law under Title VII, but it will also make for a healthier and more rehabilitative atmosphere for the inmates."[139] In *Hardin v. Stynchcomb*[140] the Eleventh Circuit approved the district

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134. *Id.* at 126 (quoting Procunier v. Martinez, 416 U.S. 396 (1974)). This deference to the state was enunciated by the Court in Preiser v. Rodriquez, 411 U.S. 475 (1973) in which the Court explained:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen . . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems . . . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Id. at 491 (footnote omitted).

135. 441 U.S. 520 (1979).

136. *Id.* at 562.

137. 433 U.S. 321, 346 (1977) (Marshall, J., dissenting).

138. 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982).

139. *Id.* at 29,222.

140. 691 F.2d 1364 (11th Cir. 1982).

court's statement that "[t]he presence of women may, in fact, contribute to the normalization of the prison environment."[141]

This argument has been flatly rejected, however, by other courts. In *Bowling v. Enomoto*[142] the court said:

> Defendants do not argue, and indeed they could not convincingly argue, that the practice of allowing female officers to view male inmates in the nude furthers the penological interest of rehabilitation. On the contrary, in the normal social setting which prison inmates are ostensibly being rehabilitated to function within, people do not undress, bathe, or defecate in the presence of strangers of the opposite sex.[143]

The argument also was rejected by the California Third Circuit Court of Appeals in *In re Long*,[144] a case dealing with a juvenile detention center that employed a staff of both sexes. The court noted the state's position that employing members of both sexes helped to normalize the environment but also noted that this position had received its impetus from legal pressures to avoid the BFOQ exception.[145]

> In a normal social setting young men of 19 do not undress, bathe, void or excrete in the maternal presence. They are not forced to disrobe in the bathroom to escape female surveillance. Far from normalizing the environment, the presence of female observers in these areas of the institution violates the norms of privacy prevailing in free society.[146]

This was also the position of the Maryland District Court in *Hudson v. Goodlander*.[147] "Such a practice aggravates, rather than mitigates, the disparity between the prison environment and society at large."[148]

The courts are also in conflict whether remedial measures are appropriate. Although federal courts have required the employer to prove that it is impossible to accommodate the competing interests,[149] the court in *In re Long*[150] held otherwise.

> [T]he institutional authorities have been at some pains to ameliorate the exposure by installing frosted glass and partitions. The institution's necessities, however, call for unceasing staff surveillance of wards. That need belies the feasibility of supplying wards with places of concealment. When undressing in the bedroom, when bathing, urinating or defecating, the wards must be either visible to the observer, partially visible or available for visibility. When the observer is female, an invasion of privacy occurs which is not justified by institutional needs.[151]

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141. *Id.* at 1367, n.9 (quoting Hardin v. Stynchcomb, No. 77-5974A, slip op. at 14–15 (N.D. Ga. Oct. 21, 1980)).
142. 514 F. Supp. 201 (N.D. Cal. 1981).
143. *Id.* at 203–04.
144. 127 Cal. Rptr. 732, 736–37 (Ct. App. 1976).
145. *Id.* at 737.
146. *Id.*
147. 494 F. Supp. 890 (D. Md. 1980).
148. *Id.* at 893.
149. *See, e.g.*, Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981); Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980); Forts v. Ward, 471 F. Supp. 1095 (S.D.N.Y. 1979), *vacated and remanded*, 621 F.2d 1210 (2d Cir. 1980).
150. 127 Cal. Rptr. 732 (Ct. App. 1976). *See also* Iowa Dep't of Social Services v. Iowa Merit Employment Dep't, 261 N.W.2d 161, 167 (Iowa 1977) in which the Iowa Supreme Court said, "We do not believe the institution should be required to substantially adjust its physical plant or procedure in order to support the imposition of a classification."
151. 127 Cal. Rptr. 732, 737 (Ct. App. 1976).

The court in *Griffin v. Michigan Department of Corrections*[152] distinguished *In re Long* because "[i]n the context of youth detention facilities, state courts have been understandably more zealous to protect the privacy rights of young people . . . .[T]he humiliation and embarrassment which some children might feel could result in the loss of self-esteem that would hinder an individual's rehabilitation."[153] Several state courts also have refused to require remedial measures and subsequently have been contradicted by the federal courts.[154] It is difficult to understand courts such as *Griffin,* which apparently believe that the rehabilitation of juveniles could be hampered by having mixed guard staffs but that mixed guard staffs do not affect adults. The argument that the resulting loss of self-esteem would hinder an individual's rehabilitation should be just as forceful in the prison context as it is in the juvenile setting, and the federal courts should not circumvent a rational determination made by the state that the inmates' rehabilitation would suffer.

The divergent assessments of the impact of the use of guards of the opposite sex from that of the inmate population illustrates need for deference to the state executive and legislative determination that a BFOQ is proper in this setting. The authorities should make the determination of how best to achieve the goals of their prison systems. If the states believe that guards of the opposite sex of the prisoners do not normalize the environment, cause a security threat by disrupting the prison population, and invade the prisoner's right to some semblance of privacy and decide that a BFOQ is the proper approach to resolve this problem, this decision should not be disturbed by the federal courts.

Additionally, the federal courts' independent decisionmaking process has put them in direct conflict with state authorities on several occasions.[155] The extent to which the use of guards of the opposite sex conflict with an inmate's right to privacy and the corresponding effect on prison administration is best left to the state. Thus, despite its decision that inmates possess only a limited right to privacy, the Seventh Circuit in *Smith v. Fairman*[156] correctly noted that: "[t]he community's standards are obviously prime concerns in deciding how to regulate contacts, relationships, and exercises of authority between people of opposite sexes. Judges are not by office or training specially qualified as the regulators."[157]

In *Griffin v. Michigan Department of Corrections,*[158] in which a federal court dealt with Michigan's prison system, the policy of allowing women to be transferred and promoted to all correctional facilities except for the three maximum security prisons had been approved directly by the State Department of Civil Service and indirectly by the State Department of Civil Rights and the State Attorney General.[159]

152. 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982).
153. *Id.* at 29,221.
154. *See infra* notes 160–71 and accompanying text.
155. *See infra* notes 158–66 and accompanying text.
156. 678 F.2d 52 (7th Cir. 1982), *cert. denied,* 103 S.Ct. 1879 (1983).
157. *Id.* at 55 (quoting United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 159 (S.D.N.Y. 1977)).
158. 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982).
159. *Id.* at 29,216.

In *Carey v. New York State Human Rights Appeal Board*,[160] the New York State Appellate Division affirmed the finding of the New York State Division of Human Rights and held that under New York law, sex was a BFOQ for the position of correction officer in an all male correction facility.

> [O]ur examination of the record and our own judicial common sense makes it clear that the qualification is required . . . . [B]oth the needs of the correctional facilities to maintain security by such means as body searches and the needs of the inmates for privacy in those aspects of their lives in confinement which involve such matters as baths, or showers, medical examination and treatment and their psychological security, which is necessary to promote the rehabilitative phases of their confinement, combine to provide a rational basis and a governmental need for limiting contacts in such circumstances to correction officers of the same sex as that of the inmates.[161]

Relying upon *Carey*, the New York Court of Appeals reached the same decision in *Reynolds v. Kramarsky*.[162] Plaintiff then filed with the Equal Employment Opportunity Commission and subsequently brought suit in federal court.[163] Defendants filed a motion to dismiss on the grounds of res judicata.[164] The district court denied the motion, stating, "*Carey* seems to conflict with federal decisions, and it is quite likely that plaintiff's federal claim will not fail simply because of the BFOQ exception contained in Title VII."[165] In a footnote to this statement the court commented that, although the New York court's decision might appear more realistic, this did not justify the court's ignoring the substantial body of controlling federal law.[166]

In *Iowa Department of Social Services v. Iowa Merit Employment Department*[167] the Iowa Supreme Court found that under Iowa law, a BFOQ existed on which the state could premise a correction officer II classification according to sex.[168] Plaintiff then filed in federal court under Title VII.[169] Defendant's motion for dismissal on the grounds of res judicata was denied because the state and federal laws created separate causes of action and could be subject to different standards.[170] The district court's decision, which was affirmed by the Eighth Circuit Court of Appeals, denied the application of a BFOQ.[171]

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160. 61 A.D.2d 804, 402 N.Y.S.2d 207 (1978), *aff'd*, 46 N.Y.2d 1068, 390 N.E.2d 301, 416 N.Y.S.2d 794 (1979), *appeal dismissed*, 444 U.S. 891 (1979).

161. *Id.* at 805, 402 N.Y.S.2d at 208–09.

162. 64 A.D.2d 636, 407 N.Y.S.2d 443 (1978).

163. Reynolds v. New York State Dep't of Correctional Servs., 568 F. Supp. 747 (S.D.N.Y. 1983).

164. *Id.* at 749.

165. *Id.* at 751 (footnote omitted).

166. *Id.* at 751, n.8.

167. 261 N.W.2d 161 (Iowa 1977).

168. The court reviewed the duties of a correction officer II and determined that it was impossible to separate the classification from the duties the female plaintiff could not perform without violating inmates' constitutional privacy rights. The essential function, although flexible, demanded close personal contact with inmates and intimate inmate surveillance. In recognizing the BFOQ, the court concluded, "The civil rights act permits reasonable classifications of employees based on sex, and an employer is required to neither pattern a job for a woman or man, nor accept an inefficient mode of operation. 14 C.J.S. Supp. Civil Rights § 68, p.120 (1974). *See* Dothard v. Rawlinson, 433 U.S. 321, 331, 97 S. Ct. 2720, 2728, 53 L.Ed.2d 786, 799 (1977) n. 14." *Id.* at 167.

169. Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).

170. 462 F. Supp. 952, 954 (N.D. Iowa 1979).

171. 462 F. Supp. 952, 958, *aff'd*, 612 F.2d 1079 (8th Cir. 1980).

In *Percy v. Allen*[172] the state trial court had upheld a BFOQ for the Maine State Prison on the grounds of the character of the inmate population and the public interests in protecting an inmate's right to privacy. The Supreme Judicial Court of Maine overruled, finding that the state legislation reflected an intent for the state courts to look to federal case law in the area of antidiscrimination.[173] A concurring opinion raised a concern that federal law dominated state decisions. "If every decision in a claim of discrimination is to start with the answer provided by the federal courts, the Maine Human Rights Act will not long remain responsive to the particular needs and circumstances of the people of the State of Maine."[174]

In sum, federal courts have disregarded state law. As the decisions of the federal courts make clear, absent identical *Dothard* conditions (which no other prison has or would want to meet), a BFOQ is not justified.[175] Whenever a state affirms a BFOQ, plaintiff can proceed to federal court under Title VII and have the state court decision nullified.

B. *Proper Presentation of Inmates' Privacy Interests*

Even if the federal courts refuse to defer to the legislative and executive branches of state government in equal employment opportunity claims in the prison setting, a different approach needs to be utilized in balancing the competing interests of inmate privacy and equal employment opportunity. At present, when guards file suit, the prison administrator is given only limited standing to represent the inmates' privacy interests.[176] This results in a less than complete analysis of the inmates' interests and places the prison administrator in the position of being confronted with additional lawsuits by inmates. Inmate rights must give way because the court has previously determined that a BFOQ is improper.

The prison administrator should have standing to represent the inmates' interests.[177] This was the position in *Fesel v. Masonic Home of Delaware*,[178] a case cited by several federal courts in support of the requirement that remedial measures be examined to balance the competing interests before allowing a BFOQ.[179] *Fesel* concerned a nursing home for the elderly. Plaintiff claimed he was denied a position as a nurse's aide on the basis of his sex.[180] The Delaware District Court held that when an employer was claiming a BFOQ defense based upon the employer's perception of the privacy interests of its clients or customers rather than the employee's physical capacity to perform the job, the employer must establish not only the

172. 449 A.2d 337 (Me. 1982).

173. *Id.* at 342.

174. *Id.* at 346 (Walthen, J., concurring).

175. *See supra* notes 30–62 and accompanying text.

176. *See supra* notes 69–72 and accompanying text.

177. Alternatively, the argument should be made that to deny such standing requires that the inmates be joined as indispensable parties.

178. 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

179. *See, e.g.*, Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981); Hardin v. Stynchcomb, 691 F.2d 1364, 1371 (11th Cir. 1982).

180. 447 F. Supp. 1346, 1349 (D. Del. 1978).

primary purpose test of *Diaz* but also that, due to the nature of the business, it would not be possible to assign job responsibilities in a selective manner so as to avoid colliding with the customers' privacy rights.[181] The court concluded, "Here personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business."[182]

By allowing the employer to represent its customers' interests, the court properly could balance the privacy interests with the claim of denial of equal employment opportunity. These two interests then could be reconciled with the primary purpose of the nursing home—providing care to the elderly. In *Fesel* the court decided that, based upon the facts of this particular case, the employer was unable to accommodate the competing interests. "[W]here a duty of accommodation exists, it nevertheless falls short of requiring an employer to sacrifice either efficiency or wages to accommodate the employee."[183] The court therefore held that the "Masonic Home has met its burden of proof and has successfully established a BFOQ defense based upon the privacy interests of its guests."[184]

This was also the court's view in *Iowa Department of Social Services v. Iowa Merit Employment Department*[185] in which the Iowa Men's Reformatory was the defendant. The inmates were not a party to the suit. The court noted that, "[C]onsideration of inmates' constitutional rights requires mention of another threshold question. Were the inmates' constitutional rights an issue raised in these proceedings? We think the answer is plainly yes. The inmates' constitutional right of privacy was an issue at every step in these proceedings."[186]

Refusing to allow the prison administrator fully to represent the inmates' privacy interests results in a biased balancing approach. When guards file suit, prison administrators are limited to inmates' rights in relation to prison security[187] or are accused of raising the defense as a sham to continue their alleged discriminatory practices.[188] The issue of the inmate's constitutional right as balanced against a person's statutory right under Title VII is not considered.

Although the Supreme Court, as noted in *United States v. Hinckley*,[189] has never considered the extent to which convicted prisoners are protected by the fourth amendment's guarantee of freedom from unreasonable searches and the general right of personal privacy, the Court has held, "There is no iron curtain drawn between the

181. *Id.* at 1351.
182. *Id.* at 1352.
183. *Id.* at 1354, n.12.
184. *Id.* at 1354.
185. 261 N.W.2d 161 (Iowa 1977). Plaintiff subsequently filed in federal court. Defendants' motion for dismissal on the grounds of res judicata was denied on the basis that state and federal laws created separate causes of action. The federal court disallowed the BFOQ defense. Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 954 (N.D. Iowa 1979), *aff'd*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980).
186. *Id.* at 164.
187. *See supra* notes 69–72 and accompanying text.
188. *See supra* notes 73–75 and accompanying text.
189. 672 F.2d 115, 128 (D.C. Cir. 1982).

Constitution and the prisons of this country."[190] The analysis of the particular governmental invasion of a citizen's personal security must always be the reasonableness in all of the circumstances.[191] In *Bell v. Wolfish*,[192] which dealt with strip searches of male inmates by male guards, the Court concluded:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[193]

In *Bell*, therefore, the Court balanced the legitimate security interest of the institution against the privacy interests of the inmate.

When a guard files suit and the prison raises the BFOQ defense based upon an inmate's privacy rights, the balancing test must be one in which the competing interests of a citizen's statutory Title VII rights and an inmate's constitutional privacy right are examined and reconciled under the rubric of the prison setting, where the primary purposes are security, rehabilitation, and deterrence.[194] The current analysis used by the federal courts when a suit is brought by guards is to balance the guards' rights against the prison's security interests. When suit is brought by inmates, the federal courts balance the inmates' privacy rights against the prison's need to provide equal employment opportunity. Neither approach properly identifies or resolves the issues. The federal courts have refused to allow the prison administrator to represent the inmates' interest in the former but have automatically required the prison administrator to represent the employees' interest in the latter. This biased approach ensures that equal employment opportunity will always be given preferential treatment.

The fallacy of this analysis was pointed out by the Oregon Supreme Court in *Sterling v. Cupp*.[195] In *Sterling* male inmates brought suit to enjoin prison officials from assigning female guards to prison duties involving searches. The female guards intervened. The inmates did not claim that the searches in themselves were improper but, rather, that when they were performed by a member of the opposite sex, the searches were a needless indignity and an imposition because they went beyond a recognized necessity. The court analyzed the right to privacy separately from equal employment opportunity and the prison's security concerns. The court reasoned that, like punishment, what was or was not an indignity was largely a matter of social and

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190. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974). The recent Supreme Court decision of Hudson v. Thomas, 52 U.S.L.W. 5052 (July 3, 1984) limits this statement to the extent the Court held that the fourth amendment has no applicability to a prison cell. In Hudson respondent, an inmate at a Virginia penal institution, claimed he was entitled to fourth amendment protection against unreasonable searches of his cell. The Court balanced the reasonableness of the prisoner's expectation of privacy in his prison cell against the prison administrator's need to conduct random searches to insure prison security. Based upon this analysis, the Court held in favor of the prison." It would be impossible to accomplish the prison objectives of preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells." *Id.* at 5052. The decision was limited to cell privacy and there is no discussion of the limits of any personal privacy rights as discussed in the context of this Comment.

191. United States v. Hinckley, 672 F.2d 115, 129 (D.C. Cir. 1982) (citing Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).

192. 441 U.S. 520 (1979).

193. *Id.* at 559.

194. Pell v. Procunier, 417 U.S. 817, 822–23 (1974).

195. 290 Or. 611, 625 P.2d 123 (1981).

individual psychology.[196] The court took notice of the Federal Standards for Corrections and the American Correctional Association's Manual of Correctional Standards which both outlined guidelines to assure privacy to female prisoners. These guidelines included not allowing guards of the opposite sex to search newly admitted prisoners.[197] Based upon these guidelines and judicial notice that society at large found such contact offensive, the court decided it made little sense to hold men were entitled to any less consideration of their right to privacy.[198]

Therefore, to justify female guards searching male inmates, the state had to prove necessity.[199] The state claimed that its desire to provide equal employment opportunity provided the requisite necessity. The court disagreed and clarified the competing interests:

> [D]espite the diverging objectives of the two groups, the law does not pit the rights of prisoners against those of correction officers. The prisoners' rights, like all constitutional rights, run against the state. Similarly, the officers' rights to equal employment opportunities are claims upon the state. . . . [T]heir interest is in sharing the economic and noneconomic opportunities in an occupation in which government is effectively the only employer.
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> . . . .
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> In the present case, the claim for relief before the trial court is that of prisoners, not of correction officers . . . . Such rights do not serve OSP [Oregon State Penitentiary] as a reason why disregard of otherwise protected prisoner interests . . . is "necessary."[200]

Defendants, therefore, were enjoined from allowing female guards to conduct pat down or frisk searches absent a situation in which immediate circumstances justified necessity. The court also noted that during pendency of the appeal, the defendants had promulgated administrative rules providing that, except in cases of emergency, only guards of the same sex as the prisoners could conduct searches of any kind or have, as part of their regular duties, assignments in which inmates would be observed in open showers, in toilets, or in the nude. The court told defendants to move to have the injunction lifted on the grounds they adequately regulated the challenged practice and, therefore, judicial intervention was no longer necessary or appropriate.[201]

The approach of the court in *Sterling* is the approach that should be taken by the federal courts. The *Sterling* court limited its review of the prison administrator's actions to whether they were reasonable in light of constitutional requirements.[202] The court distinguished the citizen's and the inmate's rights as separate claims against the state.[203] The court found the administrator's actions were not constitutionally permissible as they overly infringed upon the inmate's right to privacy. However, rather than trying to fashion a remedy, as the federal courts have done, the

196. *Id.* at 623, 625 P.2d at 132.
197. *Id.* at 621–22, 625 P.2d at 130–31.
198. *Id.* at 625, 625 P.2d at 133.
199. *Id.* at 625–26, 625 P.2d at 133.
200. *Id.* at 626–28, 625 P.2d at 133–34.
201. *Id.* at 632, 625 P.2d at 136.
202. The court's decision was based upon the Oregon rather than the United States Constitution. *Id.*
203. 290 Or. 611, 628, 625 P.2d 123, 134 (1981).

Sterling court deferred to the remedy created by the state in the new administrative rules and found them to be reasonable.[204]

C. *Effect of Federal Courts' Failure to Apply the Deference Standard and Properly Consider Inmates' Rights*

The present approach taken by the federal courts in equal employment opportunity claims in the prison setting has several drawbacks. The approach fails to take into account the proper role to be played by the judicial, as compared to the executive and legislative branches of the government, especially when a state system is involved. The approach also fails to consider fully the competing interests and, in turn, improperly derogates inmates' privacy rights, leaves the administrator without adequate guidelines, and opens the door for future litigation.

The prison environment is unique in our society and requires rules far different from those imposed on society at large.[205] Courts are in conflict as to the effect of guards of a sex opposite that of the inmate in the prison setting[206] and whether the particular circumstances of a prison system support a BFOQ.[207] This area is extremely sensitive and is one in which federal courts are ill–equipped to second guess the decisions of the state legislatures, which know better their community's mores and how legitimate penal objectives best can be achieved. When the federal courts require prison administrators to rearrange job assignments or make structural changes to accomodate Title VII, the courts not only derogate inmates' rights without fully considering them but also proceed upon the belief "that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution . . . ."[208]

This confusion is exemplified in several cases. In *Hardin v. Stynchcomb*[209] the District Court for the Northern District of Georgia had ruled that jail conditions justified a BFOQ.[210] The Eleventh Circuit, in a 2–1 decision, held that jail conditions did not justify a BFOQ.[211] The dissenting judge would have affirmed the district court's ruling based upon the facts of this particular case. He felt that it was impossible to accommodate the equal employment opportunity interests of the female guards without hampering prison security and violating the inmates' rights to privacy.[212] In *Forts v. Ward*,[213] although both the district court and court of appeals were reluctant to recognize a BFOQ, they disagreed over the accommodations, with the court of appeals believing that the district court should have spent more time considering the type of sleepwear that was available.[214] In *Hardin* the court was

204. *Id.* at 632, 625 P.2d at 136.
205. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 137 (1977).
206. *See supra* notes 128–48 and accompanying text.
207. *See supra* notes 150–74 and accompanying text.
208. Bell v. Wolfish, 441 U.S. 520, 562 (1979).
209. 692 F.2d 1364 (11th Cir. 1982).
210. Hardin v. Stynchcomb, No. 77–597A (N.D. Ga. Oct. 21, 1980).
211. 691 F.2d 1364, 1374 (11th Cir. 1982).
212. *Id.* at 1376 (Clark, J., dissenting).
213. 471 F. Supp. 1095 (S.D.N.Y. 1979), *vacated and remanded*, 621 F.2d 1210 (2d Cir. 1980).
214. 621 F.2d 1210, 1217 (2d Cir. 1980).

substituting its opinion for that of the prison administrator. In *Forts* the court was becoming enmeshed in the minutiae of day to day prison administration.

The federal courts have lost sight of the need for a penal system to be judged on its own facts like the Court did in *Dothard* rather than by a comparison to systems in other states. The states' penal objectives, physical prison conditions, and inmate population character are not uniform. When the federal courts impose their own requirements, the courts place themselves in direct conflict with the state and can, in fact, undermine the prison's primary purposes of security or rehabilitation.

Additionally, the federal courts' refusal to allow the prison administrator to represent the inmates' privacy interests or to limit the representation to penological security concerns fails to take properly into account the competing interests and, in turn, undermines the role of the prison administrator. When the state legislative and executive branches are deciding how prison objectives of security and rehabilitation best can be accomplished in the context of guards of a sex opposite that of the inmates, they must also consider an inmate's privacy rights and how the two interests best can be balanced without having a detrimental effect on the prison's primary purposes. The federal courts should do no less. The present approach allows the federal courts to dismiss legitimate penological concerns based upon speculation.[215] However, this contradicts the Supreme Court's conclusion that such deference is necessary.

In *Jones v. North Carolina Prisoners' Labor Union*[216] inmates brought suit because the prison administrator had regulated the inmates' union activities. The District Court for the Eastern District of North Carolina ruled in favor of the inmates because there was "no consensus" among experts on these matters,[217] and not one "scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions."[218] The Supreme Court reversed because the district court had failed to give proper deference to the prison administrator or appropriate recognition to the peculiar and restrictive circumstances of penal confinement.

> The interest in preserving order and authority in the prisons is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever present potential for violent confrontation and conflagration. Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot.[219]

When the courts refuse to address the inmates' privacy rights, prison administrators are left without guidelines on the extent to which guard positions are limited. When prison administrators assign guards to positions regardless of sex, administrators are found to have violated an inmate's constitutional right of privacy. *Hudson v. Goodlander* illustrates this problem.[220] Prior to 1979 the prison administrator had

215. Griffin v. Michigan Dep't of Corrections, 31 Empl. Prac. Dec. ¶ 33,482 at 29,217 (E.D. Mich. Nov. 12, 1982); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769, 775 (S.D. Ohio 1981).

216. 433 U.S. 119 (1977).

217. 409 F. Supp. 937, 942 (E.D.N.C. 1976).

218. *Id.* at 944.

219. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 132–33 (1977) (citation omitted).

220. 494 F. Supp. 890 (D. Md. 1980).

restricted guard positions by sex where inmate nudity regularly occurred. In 1979 the prison administrator opened up positions regardless of sex because male guards were complaining of receiving a disproportionate share of the onerous assignments and female guards were complaining that their opportunity for advancement was limited by their inability to become familiar with all facets of the institution.[221] The male prisoners then filed suit. The court held that the inmates' privacy rights had been violated.[222] In response to plaintiffs' claim for damages, however, the court concluded:

> An examination of the case law in this area reveals a wide disparity in the judicially mandated accommodation of equal employment opportunity policies and privacy interests of inmates. The defendants clearly attempted to conform their conduct to what they perceive to be the constitutional norm. Given the importance of each of the competing interests, and the relative dearth of clear judicial guidance in this area, the Court finds that the defendants acted reasonably, albeit incorrectly, in setting the challenged policy.[223]

The court in *Harden v. Dayton Human Rehabilitation Center*[224] also realized the dilemma it was creating. "While the Defendants' desire to avoid a multiplicity of lawsuits is understandable, the Court must adhere to established concepts of justiciability, which prohibit the determination of issues not having 'sufficient immediacy and reality' to merit the invocation of the Court's jurisdiction."[225]

IV. Conclusion

When a claim of denial of equal employment opportunity in the state prison setting is brought in the federal courts, the review should be limited to whether a constitutional violation has occurred. The court should defer to the actions taken by the prison administrators as representatives of the state legislative and executive branches of the government if the actions are found to be reasonable. If the court believes that a constitutional infringement has occurred, the court should detail the nature of the constitutional violation and then defer to the prison administrator to fashion a remedy. By properly addressing the separate issues of an inmate's right to privacy and a person's right to equal employment opportunity under the rubric of the prison's primary purposes and by recognizing a BFOQ when it is a reasonable way in which to balance these competing interests, the prison administrator has appropriate guidelines for fashioning remedies and utilizing a BFOQ when necessary. When the federal court supplants its opinion for that of the state legislative and executive branches and refuses to allow prison administrators to represent inmates' privacy concerns, the court abuses its discretion, increases litigation, and further derogates an inmate's constitutional rights.

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221. *Id.* at 892.
222. *Id.* at 893.
223. *Id.* at 895.
224. 520 F. Supp. 769 (S.D. Ohio 1981).
225. *Id.* at 782 (citations omitted).